

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

74-2313

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

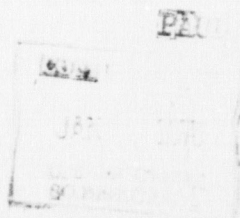
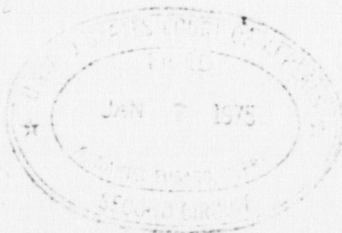
NICHOLAS NILONBRACCI, ANGELO BRINO
and JAMES DE DOMENICO,

Defendants-Appellants.

APPELLANTS' APPENDIX

HENRY W. STIFF
Attorney for Appellants
NICHOLAS NILONBRACCI
414 Lexington Avenue
New York, New York

H. HARVEY MAY
Of Counsel



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DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
3-74	DEFT. Torres appears (Atty. Present) Deft. pleads N/G. Bail continued as previously fixed by the Magistrate at \$10,000 cash. Knapp, J. Case assigned to Judge Mac Mahon for all purposes.		
24-74	Marked off as to deft. Torres. Knapp, J.		
19-74	JAMES DI DOMENICO= Filed Appearance Bond in the sum of \$20,000.00 secured by \$1,000.00 Cash - Receipt #37471 - Name of surety, Joseph Di Domenico - Clerk.		
2-74	Pre-Trial Conf. held. Date set for Trial, 7-29-74.		
8-74	NICHOLAS HILDEBRANDT= Filed Notice of Appearance of Atty. Sidney M. Offer, 415 Lexington Ave, NYC 10017 Tel#661-8454.		
8-74	JAMES DI DOMENICO= filed notice of Appearance of Atty. Benjamin Gold, 29 West 34th Street, N.Y.C. Tel # WI 7-4541.		
10-74	Pre-Trial Conference held.		
11-74	Filed sealed envelope to be placed in Vault 602 and there retained until the further order of this Court. So ordered-MacMahon, J.		
2-74	LEONARD TORRES= Filed Defts Notice of Motion for Dismissal of Indictment and a Bill of Particulars. (N/G)		
2-74	LEONARD TORRES= Filed MEMO ENDORSEMENT on the above Notice of Motion. Motion disposed of as per record at conference held 4-2-74. SO ORDERED--MacMahon, J.		
22-74	LEONARD TORRES= (Atty. present) Changes plea of NOT GUILTY, and pleads GUILTY TO Ct. 1. Pre-sentence report ordered. Date of sentence 10-1-74, @ 10:00 AM, Courtroom #513 --- MacMAHON, J.		
29-74	Trial begun for Deft's HILDEBRANDT, SEIJO and DI DOMENICO.		
30-74	Trial continued and concluded. Jury, finds HILDEBRANDT GUILTY on all Counts. Jury finds SEIJO GUILTY on Ct. 1 & 4., NOT GUILTY on Count 5. Jury finds DI DOMENICO GUILTY on Counts 1 & 2. P.S.R. ordered. Defts motion to set aside verdict, DENIED.		

(Cont'd on Page 3)

110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date of Judgment
30-74	(Cont'd) Deft. SEIJO and DI DOMENICO bail revoked and the Defts REMANDED. date of Sentence 10-1-74 @ 10:00 AM--MacMahon, J.	
31-74	LEONARD TORRES-Filed Deft's acknowledgment of his constitutional rights.	
74	ALL DEFT'S-Filed plttf's request to Charge.	
4-74	NICHOLAS HILDEBRANDT- Filed Affidvt and Constant Order to allow deft to visit his brother Ralph Hilderbrandt, in the intensive Care Unit at the Metropolitan Hospital at 96th St. & 2nd Ave, NYC on 8-16-74.	
9-74	ANGELO SEIJO- Filed Appearance Bond for the sum of \$10,000.00 Cash- Receipt-acknowledged by the Clerk.	
74	Filed transcript of record of proceedings dated 7-30-74	
74	Filed Transcript of record of proceedings dated 7-29-74	
74	ANGELO SEIJO-Filed Notice of Appeal to USCA from Final Judgment ent.10-1-74.. Notice Mailed to U.S. Atty & Deft: 2-11 Memo-Ent-Leave to appeal in FORMA PAUPERIS is Granted. So Ordered. MacMahon, J.	
74	NICHOLAS HILDEBRANDT-Filed Deft's Notice of Appeal to USCA from J'dg. & conviction herein on 10-1-74...Notices Mailed 10-7-74 to:Deft. US Atty's Office. Foley Sq.	
74	JAMES DI DOMENICO-Filed Judgment & Commitment...IT IS ADJUDGED that the deft. (Atty Benjamin Cold Present) is hereby committed to the custody of the ATTORNEY GENERAL for imprisonment for a period of FIVE (5) YEARS, Special Parole on each of counts 1 and 2 to run concurrently with each other.--MacMahon, J. (C.S.)	
74	NICHOLAS HILDEBRANDT-Filed Judgment(Atty. Sidney Offer Present)that the deft. is hereby committed to the custody of the Atty. General for imprisonment for a period of FIFTEEN (15) YEARS, and THREE (3) YEARS, Special Parole on each of counts 1, 2, 3, and 4 to run concurrently with each other.--MacMahon, J. (C.S.)	
1-74	ANGELO SEIJO-Filed Judgment(Atty.Murray Vogel-Legal Aid-Present) that the deft. is committed to the custody of the Attorney General for imprisonment for a period of FIFTEEN (15) YEARS, and THREE (3) YEARS, Special Parole on each of counts 1 & 4 to run concurrently with each other. Count 6 dismissed on motion of deft's counsel and on consent of the Govt.--MacMahon, J. (C.S.)	
74	LEONARD F. TORRES-Filed Judgment & Order Of Probation(Atty.Robert Reighton, Present) that the imposition of sentence on count 1 suspended. Deft. placed on probation for a period of FIVE (5) YEARS, subject to the standing probation order of this Court. Special Condition of probation is that the deft. be required to participate in a community base drug treatment program implemented by The Osborne Association, 114 East 30 St., N.Y. and under the auspices of the Probation Dept, U.S. District Court, Southern District of N.Y. Count 2, 3, 4, are dismissed on motion of deft's counsel with the consent of the Government. MacMahon, J. (cs)	
6-74	ANGELO SEIJO- Filed CJA-23 - Financial Affidavit.	

(Cont'd on Page #4)

	PROCEEDINGS	Date Order Judgment N
-74	JAMES DI DOMENICO- Filed MEMO ENDORSEMENT on Deft letter dated 9-13-74 requesting a reduction of sentence - The Motion in all respects is DENIED - SO ORDERED - MacMAHON, J. (Pro-Se to mail notice)	
2-74	Filed the following papers rec'd from Magistrate Raby (Mas#74-738) = 4 Docket Entry Sheets - Criminal Complaint - Disposition Sheet - 4 Financial Affidvts - CJA23 - 4 Temporary Commitments - Appearance Bond for LEONARD TORRES, in the amount of \$10,000. Cash Bail dated 6-10-74 - Notice of Appearance for Deft JAMES DI DOMENICO & LEONARD TORRES - Appointment of Counsel for Deft LEONARD TORRES, by Robert Leighton, 15 Park Row, NYC 10038, and for Deft NICHOLAS HILDEBRANDT, by Sidney Offer, 415 Lex. Ave, NYC 10017.	
7-74	JAMES DI DOMENICO- Filed commitment & entered return, Deft delivered to WARDEN, F.D.H., NYC on 10-1-74	
7-74	NICHOLAS HILDEBRANDT- Filed commitment & entered return. Deft delivered to WARDEN, F.D.H., NYC on 10-1-74	
	<p>A TRUE COPY RAYMOND E. LEECHARDT Clerk A.E. By Thompson Deputy Clerk</p>	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

NICHOLAS HILDEBRANDT,
LEONARD TONES, - *Red Smith*
ANGELO SEISO, and
JAMES DI DOMENICO,

Defendants.

INDICTMENT

74 Cr.

The Grand Jury charges:

1. From on or about the 1st day of April, 1974,
and continuously thereafter up to and including the date of
the filing of this indictment, in the Southern District of
New York,

NICHOLAS HILDEBRANDT,
LEONARD TONES,
ANGELO SEISO, and
JAMES DI DOMENICO,

the defendants and others to the Grand Jury unknown, unlaw-
fully, intentionally and knowingly combined, conspired, confederated
and agreed together and with each other to violate Sections 812,
841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said
defendants unlawfully, intentionally and knowingly would distribute
and possess with intent to distribute Schedule I
narcotic drug controlled substances the exact amount thereof
being to the Grand Jury unknown in violation of Sections 812,
841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about the 11th day of April, 1974, the defendants LEONARD TORRES and JAMES DI DOMENICO were in the vicinity of Latting and Edward Avenues, Bronx, New York.

2. On or about the 13th day of April, 1974, the defendant LEONARD TORRES was in the vicinity of Latting and Edwards Avenues, Bronx, New York.

3. On or about the 5th day of June, 1974, the defendants NICHOLAS HILDEBRANDT, LEONARD TORRES and ANGELO SEIJO were in the vicinity of Southern Boulevard and Fordham Road, at the Howard Johnson's Restaurant in the Bronx, New York.

(Title 21, United States Code, Section 846.)

SECOND COUNT

The Grand Jury further charges:

On or about the 11th day of April, 1974, in the Southern District of New York, LEONARD TORRES, JAMES DI DOMENICO, and NICHOLAS HILDEBRANDT, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 38.2 grams of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); and Title 18, United States Code, Section 2.)

*find correct
overt acts to
crime*



THIRD COUNT

The Grand Jury further charges:

On or about the 18th day of April, 1974, in the Southern District of New York, LEONARD TORRES and NICHOLAS HILDEBRANDT, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 161.5 grams of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); and Title 18, United States Code, Section 2.)

FOURTH COUNT

The Grand Jury further charges:

On or about the 5th day of June, 1974, in the Southern District of New York, LEONARD TORRES, NICHOLAS HILDEBRANDT and ANGELO SEIJO, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 259.5 grams of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); and Title 18, United States Code, Section 2.)

FIFTH COUNT

The Grand Jury further charges:

On or about the 5th day of June, 1974, in the Southern District of New York, ANGELO SEIJO, the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute, a Schedule I narcotic drug controlled substance, to wit, approximately 34.0 grams of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

SIXTH COUNT

The Grand Jury further charges:

On or about the 5th day of June, 1974, in the Southern District of New York, ANGELO SELJO, the defendant, did unlawfully, wilfully and knowingly carry a firearm during the commission of a felony, for which he could be prosecuted in a court of the United States to wit, the offenses charged in Counts One, Four and Five of this indictment.

(Title 18, United States Code, Section 924(c)(2).)

FOREMAN

PAUL J. CONNOR
United States Attorney

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AFTERNOON SESSION(1:45 p.m.)

(In open court; jury not present.)

THE COURT: I have dictated my findings on the suppression hearing on the record and it will be available for you.

MR. MOGEL: Thank you, your Honor.

(Jury present.)

CHARGE OF THE COURT

(MacMahon, J.)

THE COURT: Good afternoon.

The court and the jury have different functions. It is my function at this time to instruct you on the law that applies to this case and it is your function and duty to accept the law as I give it to you whether or not you agree with it.

In short, I am the exclusive judge of the law which you must apply to the facts as you find them. You, in turn, are the exclusive judges of the facts. You and you alone decide what weight, what effect and what value you will give to the evidence; you decide whether or not to believe a witness and, of course, ultimately the guilt or innocence of each defendant in this case.

You are not to conclude from any rulings that

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2 I have made throughout this trial or any questions that
3 I have asked that I have any opinion one way or the
4 other as to the guilt or innocence of any defendant.
5 That decision is exclusively up to you.

6 Now, finding the facts is merely a process by
7 which you, the jury, consider the exhibits and the testi-
8 mony of all of the witnesses, sift out what you believe,
9 weigh it in the scale of your reasoning powers, draw such
10 conclusions as your experience and common sense tell you
11 the evidence supports and justifies and decide just where
12 the truth lies in this case.

13 In this connection all evidence may be of two
14 general types, direct evidence and circumstantial
15 evidence.

16 Evidence is direct when the facts are shown
17 by exhibits which have been admitted into evidence or
18 when sworn to by witnesses who have actual knowledge of
19 them from something they learned through the exercise of
20 one of their fundamental senses.

21 Circumstantial evidence simply means drawing
22 a logical inference or a conclusion from other connected
23 facts that have been seen or heard. The classic example
24 of circumstantial evidence is Robinson Crusoe's sighting
25 the footprint on the sand. From the footprint and the

2 knowledge of the fact that it wasn't his own he drew the
3 conclusion that another man was on the island.

4 Not all circumstantial evidence is that
5 clear, but I am sure that you are all familiar with the
6 process of drawing logical conclusions from other con-
7 nected facts. The process is no different here.

8 No greater degree of certainty is required
9 when evidence is circumstantial than when it is direct,
10 for in either case you must be convinced beyond a reasonable
11 doubt before you can find any defendant guilty.

12 It is your memory of the evidence that controls.
13 It is not the way I remember it and not the way counsel
14 remember it. I don't intend in this short trial to
15 summarize the evidence at all. If your memory squares
16 with the lawyers' memory as they reviewed the evidence in
17 their summations, you may accept their version of the evidence.
18 But to the extent that you have a different recollection,
19 you are bound by your oath to rely on your memory.

20 Sometimes juries are only out about 10
21 minutes and they send in a note that they would like the
22 testimony of a certain witness to be read over, that
23 they want the transcript of the testimony. The
24 transcript isn't available. If you want any evidence re-
25

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read to you, the court reporter will do it at my direction.

But fundamentally you should depend on your memory. If you can't remember it, one of your fellow jurors probably can and may enable you to refresh your recollection of it. But if you cannot in the end remember the evidence and want part of the testimony read, if your foreman will send me a note that you all want it and pinpoint what you want, and bear in mind you have to have it not only on direct and cross examination so try and pinpoint what you want and we will dig it out. Now, that will take some time, and bear that in mind as well, because the court reporter has to find it and we all have to agree that that says what you want. So use restraint about that.

One of your most important functions is in determining just where the truth lies. It is your exclusive function to decide which witnesses you will believe, and this is so as to every witness, whether called by the government or by the defense.

You are not to be influenced by the number of witnesses called by either side. You are concerned not with the quantity but with the quality of the evidence.

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The first test which you should apply in determining the trustworthiness of a witness is to measure what the witness says against your plain, everyday common sense. You are not bound to believe unreasonable statements or to accept testimony that insults your intelligence just because the statements are made in sworn testimony in a public courtroom.

You saw the witnesses in this case. In deciding whether to believe a witness you should consider his conduct and his manner on the stand.

I saw you observing these witnesses with particular care as they were testifying. Obviously you were sizing them up. How did the witness impress you? Was the witness being frank with you or was he being evasive? Was his version of the evidence straightforward? Was he just parroting answers? Did he have any motive to testify falsely? Is he interested in any way in the outcome of this case? How strong or weak was his memory of important events? What was his opportunity to know the facts about which he testified? Did he show any bias or prejudice toward any party in this case? How does his testimony add up when considered with all of the other evidence. How far does his story check out with the other evidence? Are there

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2 any inconsistencies in his testimony, and, if so, how important
3 ant are they? Has he made any inconsistent statement
4 on an earlier occasion, and if so, how important are
5 those inconsistent statements?

6 In determining whether there were any in-
7 consistent prior statements you should consider not only
8 what the witness said on the prior occasion but also what
9 he left out, what he failed to say.

10 Leonard Torres testified here to the effect
11 that he had participated in the crimes charged here. If
12 you believe that, then he was an accomplice and you
13 should consider that fact in testing his credibility and
14 in weighing his testimony.

15 Obviously, a witness is not incapable of telling
16 the truth about what occurred simply because he is an ac-
17 complice, but you must examine his testimony with special
18 care and act upon it with caution.

19 In the prosecution of a crime the government
20 is frequently called upon to use persons who are
21 accomplices. Often it has no choice. They are
22 properly used. After all, the government must rely upon
23 witnesses to transactions such as they are, otherwise
24 in many instances it would be difficult to detect and to
25 prosecute wrongdoers, and this is particularly so in cases

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2 of conspiracy. Frequently it happens that only
3 those on the inside of the illegal scheme can give
4 evidence which is material and important to the case.

5 There is no requirement that the testimony of
6 an accomplice be corroborated or supported or backed
7 up by other evidence. Conviction may rest upon the
8 testimony of an accomplice alone if you believe it.

9 The credibility of Torres, like that of all
10 the other witnesses, is for you and you alone to determine,
11 taking into account any interest that Torres has, his
12 motive, any inducement or consideration he may have re-
13 ceived or hoped to receive from the government or the
14 court, any hostility he may bear toward any defendant,
15 any other evidence you recall which may reasonably be
16 considered to influence and color his testimony.

17 The defendants Angelo Seijo and James Di Do-
18 menico testified as witnesses. They were not required
19 to do so by law and their appearances as witnesses were
20 entirely voluntary on their part. Had they not
21 testified, you could not have considered their failure
22 to do so in any manner in determining their guilt or inno-
23 cence. But having testified the law requires
24 that their testimony be judged and appraised by the
25 same standards applied to the testimony of any other

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2 witnesses, giving consideration, of course, to their
3 background, to their personality and to their natural
4 interest in the outcome of this trial.

5 The defendant Nicholas Hildebrandt did not
6 take the stand. A defendant is not required to take
7 the stand and testify in his own behalf. He has no
8 burden of proof to sustain in this case. He has denied
9 the charges made against him by his plea of not guilty
10 and he is presumed to be innocent. The fact that he
11 has not testified cannot be taken into consideration by
12 you in any manner. You may not permit that fact to
13 weigh in the slightest degree against the defendant
14 Hildebrandt, nor should that fact enter into your
15 discussions or deliberations in any way.

16 If you find that any witness has deliberately
17 and wilfully lied with respect to any material fact in his
18 testimony offered at this trial, you may follow either one
19 of two courses: you may accept as much of the wit-
20 ness' testimony as you believe, or if you wish, you
21 can reject his entire testimony.

22 Before discussing the claims charged here
23 I want to remind you that an indictment is a mere
24 accusation, as I told all of you at the time you
25 were selected to serve on this jury. An indictment is

2 not evidence of the truth of the charge made and you are
3 to draw no inference of guilt from the mere fact that a
4 defendant has been indicted. An indictment simply means
5 that the defendant has been accused. The defendants have
6 denied the charges made here by their pleas of not guilty,
7 as well as in the case of Seijo and Di Domenico by their
8 testimony.

9 The defendant has no burden of proof to sustain
10 in this case. He is under no obligation to produce
11 any witnesses. He is presumed to be innocent and this
12 presumption of innocence continues throughout the trial
13 and during the deliberations of the jury. This presumption
14 of innocence is overcome when and only when the government
15 establishes the guilt of a defendant beyond a reasonable
16 doubt.

17 Now, what do I mean by beyond a reasonable
18 doubt?

19 As the phrase implies, a reasonable doubt is
20 a doubt that is based upon reason, a reason which appears
21 in the evidence or in the lack of evidence. It is not
22 a vague, speculative, imaginary doubt, nor a doubt based
23 upon emotion or sympathy or prejudice or upon what some
24 juror might regard as an unpleasant duty.

25 The government is not required to prove a

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defendant guilty beyond every possible doubt nor to an absolute or a mathematical certainty, because such measure of proof is usually impossible in human affairs.

You should review all of the evidence as you remember it, sift out what you believe and discuss it, and compare your views of the evidence with that of your fellow jurors. If that process produces a solemn belief or conviction in your mind such as you would be willing to act upon without hesitation if this were an important matter of your own, then you may say that you have been convinced beyond a reasonable doubt.

On the other hand, if your mind is wavering or so uncertain that you would hesitate before acting if this were an important matter of your own, then you have not been convinced beyond a reasonable doubt and your verdict must be not guilty.

The indictment in this case contains five counts, each of these counts contains a separate offense or crime, each count must be considered separately and we will hand a copy of the indictment to your foreman so that you can be guided in your deliberations.

The indictment names four defendants. Only three are on trial before you, however: Nicholas Hildebrandt, Angelo Seijo and James Di Domenico. They

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are the three persons whose guilt or innocence you must announce in your verdict, although, as I will explain to you shortly, in considering their guilt or innocence you may have to determine the nature of the participation, if any, of other persons. Here for example, Leonard Torres.

In the determination of guilt or innocence, you must bear in mind that guilt is personal. There is no such thing under our system of justice as guilt by mere association. The guilt or innocence of a defendant on trial before you must be determined separately with respect to him solely on the evidence presented against him, or the lack of evidence.

Let us turn now to the specific charges against the defendants.

The first count of the indictment charges a conspiracy. It charges that Nicholas Hildebrandt, Leonard Torres, Angelo Seijo and James Di Domenico, together and with others to the grand jury unknown, conspired to violate the federal narcotics laws.

I shall refer to this first count as the conspiracy count.

In order to convict a defendant on the conspiracy count, count 1, the government must prove to your

satisfaction beyond a reasonable doubt each of the following elements:

1. The existence of a conspiracy from on or about April 1, 1974 and continuously thereafter up to and including the date of the filing of this indictment, which was June 14, 1974, knowingly and intentionally to distribute heroin or to possess heroin with an intent to distribute it.

The second element that a defendant joined the conspiracy with knowledge of its unlawful purpose.

The third element that any one of the conspirators committed at least one overt act in furtherance of the conspiracy.

I will now explain what these terms mean.

The first element of the crime is the existence of a conspiracy.

Now, what is a conspiracy? A conspiracy, for its purposes, is simply a combination or an agreement among two or more people to commit a crime, the crime charged in the indictment, here a combination or an agreement among two or more people to possess narcotics or to possess them with an intent to distribute it.

Thus, a conspiracy is a kind of a partnership in a criminal venture, and it is usually secret in its

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2 origin. The gist of the crime is the combination or
3 agreement to violate the law.

4 Now, this does not mean that two or more
5 persons must meet and form some kind of a formal
6 partnership agreement or that they must sit down and agree
7 in so many words on what their unlawful scheme is to be
8 or how they are going to carry it out. When persons
9 enter into a combination or an agreement to violate
10 the law, much is left to implication and to tacit
11 understanding. Cosnpirators do not proclaim their
12 plot or publicly announce their purposes, the very nature
13 of a conspiracy calls for secrecy.

14 The first element is satisfied, therefore,
15 if you find beyond a reasonable doubt that any two or
16 more people in any way intentionally combined or agreed
17 to a common plan knowingly and intentionally to distribute
18 heroin or to possess heroin with an intention to
19 distribute it.

20 In determining whether there was such a
21 combination, understanding or agreement, you should
22 consider all of the evidence about each defendant's con-
23 duct, acts and statements. You should consider
24 not only what was said or done, but also how it was
25 said or done.

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2 Actions speak louder than words. You
3 should therefore ask yourself whether the transactions
4 shown in the evidence were conducted in a simple,
5 straightforward manner as innocent business transactions
6 or whether they were purposely devious and secret,
7 whether the meetings were open or secret, whether the
8 persons involved tried to conceal their identities in
9 any way, whether they dealt in cash, and any other
10 evidence which you recall and believe as to the manner
11 in which a defendant conducted his affairs and whether
12 his dealings were open and aboveboard or whether they
13 were surrounded by that secrecy and intrigue which are
14 the hallmark of a conspiracy.

15 From the point of view of the law there is
16 a danger to the public when two or more people combine
17 to commit a crime. The danger is greater than if the
18 lone criminal acts by himself, because two or more
19 people are able, because of the power of numbers, to ac-
20 complish crimes that are more difficult and harmful.
21 Because of this, a conspiracy to commit a crime is a
22 distinct crime in and of itself, separate and apart from
23 the crime which it is the object of the conspiracy to
24 accomplish. Thus:, a conspiracy may be found to
25 exist, although the purpose of the conspiracy is never

accomplished.

Here, for example, there never need be any distribution of heroin or any possession of heroin with an intent to distribute it, it is enough if there was an agreement to deal in it

Proof, however, of the actual accomplishment of the object of the conspiracy is the most persuasive evidence of the existence of the conspiracy itself.

The period of time charged in the indictment runs from on or about April 1, 1974 and continuously thereafter up to and including the 14th day of June, 1974. It is not necessary for the government to prove that the conspiracy alleged started and ended on those specific dates. It is sufficient if you find that a conspiracy was formed and that it existed for some substantial time within the period set forth in the indictment.

You will recall that the second element of the crime of conspiracy is that a defendant joined a conspiracy with knowledge that its purpose was to distribute heroin or to possess heroin with an intention to distribute it. When I say "joined a conspiracy," I do not mean that a defendant has to file some sort of an application for membership. However, before

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a defendant can be found to be a member of a conspiracy he must know of the existence of the conspiracy, that is; he must know that at least two other people have combined or joined together to violate the law; he must know that its purpose is unlawful, its purpose is to commit a crime, and he must voluntarily and knowingly join in the venture with an intent to combine with others in committing a crime; he must knowingly promote the scheme.

You will note that I have said that a defendant must have acted knowingly, wilfully and intentionally. This does not mean that a defendant must be aware that his conduct is criminal. Knowingly simply means that the defendant knows what he is doing, that he was acting voluntarily, deliberately and on purpose and not because of mistake, accident, carelessness or other innocent reason.

Here, again, you must look at the defendant's conduct and the way he behaves to determine what was going on in his mind. The only way we can determine intention is by the way the intention is reflected in conduct. So you should consider all of the defendants' acts in light of all the evidence and the surrounding circumstances. The adage that actions

1 speak louder than words applies here.

2 The mere fact, however, that a defendant
3 may witness a crime or be present when a crime is com-
4 mitted by others or that he attends meetings or that he
5 unwittingly assists the venture or associates or has
6 a friendship with a member of a conspiracy, or even if
7 he participates in a single, isolated narcotics transac-
8 tion with a member of the conspiracy is not enough,
9 in itself to make him a conspirator, unless you first
10 find beyond a reasonable doubt that the defendant knew
11 of the existence of the conspiracy and intentionally
12 joined in the venture with knowledge of its criminal
13 purpose.
14

15 One may become a member of the conspiracy
16 without knowledge of all of the details or of all of the
17 operations of the conspiracy. One defendant may
18 know only one other member of the conspiracy. Yet if
19 he knowingly cooperates to further the illegal purpose
20 of the conspiracy with knowledge that others have
21 combined to violate the law, he becomes a member, although
22 his role may be only an insignificant or subordinate one.

23 If you find that a defendant did join the
24 conspiracy with knowledge of its illegal purposes,
25 then he is bound by what the others say and do to promote

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or further, its purpose, even though he himself is not present.

Each conspirator is the agent or partner of every other conspirator. What one does to promote the illegal plan or the illegal agreement binds every other member of the conspiracy.

The third element of the crime is the commission by any conspirator of at least one overt act in furtherance of the object of the conspiracy.

"Overt act" means an act by any member of the conspiracy in an effort to accomplish some purpose of the conspiracy. The reason the law of conspiracy requires an overt act is that one might join a conspiracy and then withdraw from it or change his mind. In that event he could not be prosecuted.

The government has alleged three overt acts, and you will note upon reading the indictment that some of them are perfectly innocent in and of themselves.

The overt acts are that on or about the 11th day of April, 1974, the defendants Torres and Di Domenico were in the vicinity of Layton and Edwards Avenues, Bronx, New York.

Two, that on or about the 18th day of April, 1974 the defendant Leonard Torres was in the vicinity of Layton and Edwards Avenues, Bronx, New York.

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Three, that on or about the 5th day of June, 1974, the defendants Hildebrandt, Torres and Seijo were in the vicinity of Southern Boulevard and Fordham Road at Howard Johnson's restaurant in the Bronx, New York.

You will note that in and of themselves those acts are innocent. Nevertheless, if those acts were performed by any member of the conspiracy during the existence of the conference and in furtherance of its purpose, then those acts are sufficient to satisfy the third element.

The government is not required to prove that all three overt acts alleged were committed. It is enough if the government proves beyond a reasonable doubt that at least one of the overt acts was committed in furtherance of the purposes of the conspiracy by any one or more members of the conspiracy.

You must consider each defendant separately. If you find as to that defendant that the government has failed to prove beyond a reasonable doubt all three elements of the crime of conspiracy, as I have defined them, then you must acquit the defendant whom you are considering on count 1.

On the other hand, if you find that the govern-

ment has proved beyond a reasonable doubt that a conspiracy existed from on or about April 1, 1974 and continuously up to and including June 14, 1974 for the purpose of knowingly and intentionally distributing heroin or possessing heroin with an intention to distribute it, that the defendant whom are you are considering knowingly joined the conspiracy with knowledge of its unlawful purpose, and that any one of the conspirators committed at least one overt act charged in the indictment in furtherance of the conspiracy, then you may convict that defendant on count 1.

The second, third, fourth and fifth counts of the indictment I shall refer to as the substantive counts. These counts charge actual violations of the federal narcotics laws. Thus, the defendants are charged in one or more of those counts with actually distributing various amounts of heroin and possessing heroin with an intent to distribute it.

Counts 2, 3 and 4 also charge the defendants named in those counts with aiding and abetting each other in distributing heroin or possessing heroin with an intent to distribute it.

Here, again, you must consider each defendant separately, and before you can find any defendant guilty

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on counts 2, 3, 4 and 5 the government must prove to your satisfaction beyond a reasonable doubt each of the following elements:

One, that on or about the date specified in those counts the defendant either distributed heroin or possessed heroin with an intention to distribute it.

The first element is satisfied if you find that the defendant either intentionally distributed heroin or knowingly possessed heroin with an intent to distribute it, either one.

The word "distribute" means the actual constructive or attempted transfer of the drug.

The word "possession" means either actual physical possession of the heroin or such power or control over the heroin that the defendant could move it himself or cause others to move it or to deliver it at his direction. This is what is known as constructive possession.

The word "intent" refers to a person's state of mind.

So the term "possess with intent to distribute" means to control a narcotic drug with a state of mind or purpose to transfer it.

The second element is that the substance which

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was distributed or possessed with intent to distribute was, in fact, heroin. This second element is satisfied if you believe the testimony of the chemist contained in their reports that the contents of Exhibits 1, 3, 4 and 5 are heroin.

The third element is that in distributing heroin or in possessing it with intent to distribute it, the defendant act knowingly and wilfully. As to the third element, you should consider and apply all that I have previously charged you on the subject of what constitutes knowing and wilful and unlawful participation in a crime.

Moreover, as to counts 2, 3 and 4, it is not necessary for the government to show that the defendant whom you are considering actually committed the crime charged in those counts. The law provides that a person who aids and abets another to commit a crime is just as guilty of that crime as if he committed it himself. Accordingly, you may find a defendant whom you are considering guilty of the crime charged in counts 2, 3 and 4 if you find beyond a reasonable doubt that that defendant aided or abetted some other person in the commission of the crime charged in that count.

Here the government contends that each of the

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2 defendants now on trial aided and abetted each other
3 in committing the crime of distributing heroin and of
4 possessing heroin with an intent to distribute it.

5 Before you can convict a defendant for aiding
6 and abetting, however, you must find that the crime was
7 committed by another and that the defendant consciously
8 associated himself with the crime, with the intent
9 that his conduct would help it succeed. You must be con-
10 vinced beyond a reasonable doubt that he was doing some-
11 thing to aid the crime or to forward the crime of the other
12 person, that he was a conscious, knowing participant in
13 the crime with a stake in its success rather than a mere
14 witness, spectator or bystander on the scene of a crime
15 committed by another.

16 Consider each defendant and each count separately.
17 If you find with respect to the count you are considering
18 that the defendant whom you are considering, one wilfully
19 and knowingly distributed heroin or possessed heroin with
20 an intent to distribute it or, two, with respect to counts 2,
21 3 and 4, aided and abetted another in distributing heroin or
22 possessing heroin with an intention to distribute, you must
23 find that defendant is not guilty on the count you are con-
24 sidering.

25 On the other hand, if you find with respect to
the count you are considering that the defendant whom

1 you are considering, one, wilfully and knowingly
2 distributed heroin or possessed heroin with an intent to
3 distribute it or, two, with respect to counts 2, 3 and
4 4 aided and abetted another person in distributing heroin
5 or possessing heroin with an intent to distribute it,
6 then you should find that defendant guilty on the count
7 that you are considering.
8

9 You are instructed that the question of pos-
10 sible punishment of a defendant in the event of a con-
11 viction is no concern of yours and it should not in
12 any sense enter into or influence your deliberations.
13 The duty of imposing sentence in the event of a convic-
14 tion rests exclusively upon the court. Your function
15 is to weigh the evidence and determine the guilt or
16 innocence of the defendant solely upon the basis of the
17 evidence and upon the law as I have given it to you in
18 these instructions.

19 When you retire to the jury room treat one
20 another with consideration and respect, as I know you
21 will. If differences of opinion arise, your discus-
22 sions should be dignified, calm, intelligent. Your
23 verdict must be based on the evidence and the law; the
24 evidence which was presented in this case as you remember
25 it, and the law as I have given it to you in this

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2 charge.

3 You're each entitled to your own opinion.
4 No juror should acquiesce in a verdict against his indivi-
5 dual conscientious judgment. Nevertheless, no one should
6 enter the jury room with such stubbornness or pride of
7 opinion or arrogance that he would refuse to change his mind
8 if convinced by intelligent argument on the part of another
9 juror or jurors. Discussion and deliberations lie at the
10 very heart of our democratic jury process. Talk out your
11 differences.

12 Each of you should in effect decide the case
13 for himself after thoroughly reviewing the evidence and
14 frankly discussing it with your fellow jurors with an open
15 mind and with a desire to reach a verdict. If you do
16 that you will be acting in the true democratic process of
17 the American jury system.

18 There are 12 of you on this jury. The
19 remaining alternate will be excused before you retire
20 for your deliberations. Any verdict must be a unanimous
21 verdict of all of you as to each defendant and it must
22 represent the honest conclusion of each of you.

23 I submit the case to you with every confidence
24
25

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2 that you will fully measure up to the oath which you
3 took as members of the jury to decide the issues submitted
4 to you fairly and impartially without fear or favor.

5 Now, members of the jury, if you find
6 that the government has failed to establish the guilt
7 of any defendant beyond a reasonable doubt, that defendant
8 should be acquitted. If you find that a defendant
9 has not violated the law, you should not hesitate for
10 any reason to render a verdict of not guilty as to him.

11 But, on the other hand, if you find that the
12 government has established the guilt of a defendant
13 beyond a reasonable doubt, you should not hesitate be-
14 cause of sympathy or any other reason to render a verdict
15 of guilty.

16 Your foreman will return an oral verdict
17 in open court as to each defendant on each count of
18 either guilty or not guilty.

19 Are there any exceptions, gentlemen? If
20 so, I will hear you at the side bar.

21 MR. GOLD: No exceptions on the part of
22 Mr. Di Domenico.

23 MR. OFFER: No exceptions on behalf of the
24 defendant Hildebrandt.

25 MR. MOGEL: No exceptions on behalf of the

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2 defendant Seijo.

3 MR. FORTUIN: The government has no excen-
4 tions, your Honor.

5 (Two marshals were duly sworn.)

6 THE COURT: The alternate juror is ex-
7 cused.

8 (Alternate juror excused.)

9 (At 2:35 p.m. the jury retired to the jury
10 room to commence its deliberations.)

11 THE COURT: Would you get your exhibits
12 together and make sure they are the exhibits, with the
13 exception of the heroin, and send them in.

14 MR. FORTUIN: Yes.

15 MR. MOGEL: Your Honor, I have all the
16 defendants' exhibits available.

17 THE COURT: Give them to the clerk.

18 (4:35 p.m., in open court; jury present.)

19 (Jury roll called; all jurors present.)

20 THE CLERK: Mr. Foreman, has the jury agreed
21 upon a verdict?

22 THE FOREMAN: Yes, we have.

23 THE CLERK: How do you find the defendant
24 Nicholas Hildebrandt on count 1?

25 THE FOREMAN: Guilty.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, :

-v- :

AFFIDAVIT

NICHOLAS HILDEBRANDT, et al., :

74 Cr. 606 (LFM)

Defendants. :

-----X
STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

THOMAS M. FORTUIN, being duly sworn, deposes and
says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York and have responsibility for the prosecution of the above-captioned case. I submit this affidavit to set forth the circumstances surrounding the recent discovery by the Government that Leonard Torres, who testified as a Government witness at trial, had a prior marijuana conviction which the Government was unaware of during the trial and which Torres did not admit during his testimony. The Government submits that (1) there was no Government misconduct in failing to disclose the existence of the conviction; and (2) the fact of this conviction for possession of marijuana, when considered in light of Torres admission of far more serious crimes, could not conceivably have affected the jury's verdict.

2. Defendants Nicholas Hildebrandt, James Di Domenico and Angelo Seijo were convicted of conspiracy to violate the federal narcotics laws and various substantive violations of the narcotics laws after a two day trial before this Court and a jury on July 29-30, 1974.

The remaining defendant, Leonard Torres, pleaded guilty prior to trial to the conspiracy count of the indictment and testified against the other defendants at trial as a Government witness. On October 1, 1974, all defendants were sentenced as follows: Hildebrandt and Seijo were sentenced to fifteen years imprisonment and DiDomenico to five years imprisonment all to be followed by special parole terms of three years; Torres was sentenced to five years probation. Thereafter, Hildebrandt, DiDomenico and Seijo filed notices of appeal. Hildebrandt and DiDomenico's briefs are due to be filed in the Court of Appeals on December 16, 1974 and Seijo's on December 24, 1974.

3. At trial Torres admitted having committed all the crimes charged in the indictment including the attempted sale of one eighth of a kilogram of heroin. He testified that he had become addicted to opium while in the Army in Vietnam in 1969 and had thereafter been stationed at Fort Bragg, North Carolina. He testified, however, that he had no convictions for any crime prior to his arrest in this case.

4. Prior to the trial of this case, defense counsel asked me for a copy of Torres' "rap sheet". At that time, I had none. I made inquiries of the officers of the New York Drug Enforcement Task Force who were assigned to the case and who arrested Torres, and they informed me that they had checked and that Torres had no prior convictions. Mr. Torres informed me that he had never been convicted of a crime prior to his arrest in this case. I, therefore, informed defense counsel that the defendant had no prior convictions.

5. Within the last ten days I have received a so-called "rap sheet" relating to Mr. Torres (attached hereto as exhibit 1) which shows that he was arrested for, and convicted of, possession of marijuana in Fayetteville, North Carolina on October 1, 1969 and that he apparently received a suspended sentence. Although this "rap sheet" bears United States Attorney's date stamp indicating it was received by our office on July 2, 1974, prior to the trial, it was not sent to me until a few days ago. Apparently, from the markings on the document, it was erroneously sent to the Government's file room in the mistaken belief that it related to a closed case, where, presumably it remained until recently. I have spoken with Assistant United States Attorney Alan Kaufman who previously had responsibility for the prosecution of this case, and he states that he has never received the rap sheet.

THOMAS M. FORTUIN
Assistant United States Attorney

Sworn to before me this

day of December, 1974.

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UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C. 20537

The following FBI record, NUMBER 66 325 II, is furnished FOR OFFICIAL USE ONLY.
Information shown on this Identification Record represents data furnished FBI by fingerprint contractors. 74-1529
FINAL DISPOSITION IS NOT SHOWN. IF FURTHER EXPLANATION OF CHARGE IS DESIRED, COMMUNICATE WITH AGENCY CONTRIBUTING THOSE FINGERPRINTS.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRIVED OR RECEIVED	CHARGE	DISPOSITION
ON HACC t Holabird MO	Leonard Francis Torres #HNS2772066 Army	2-13-68		
ity Co ABC Bu f I ayetteville NC	Leonard Francis Torres #27116	10-1-69	poss of marij	PLG VG 2 yrs susp & place on prob for yrs pay C & \$300 F
d Det Hdqtrs 17	Leonard F. Torres 81016 158	6-6-74	vio Nar Laws	
SM Y NY	Leonard F. Torres	6-6-74	Viol US Narcotics Laws	

Notations indicated by * are NOT based on fingerprints in FBI files but are listed only as investigative leads as being possibly identical with subject of this record.